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Supreme Court of the United States

October Term 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

Appellants,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

Appellants,

v.

RICHARD H.C. TAYLOR,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
THE ASSOCIATED PRESS MANAGING EDITORS
THE NATIONAL ASSOCIATION OF BROADCASTERS
THE NATIONAL NEWSPAPER ASSOCIATION
THE NATIONAL PRESS CLUB
THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION
THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI
THE VIRGINIA PRESS ASSOCIATION

Of Counsel:

Jack C. Landau
Peter C. Lovenheim
The Reporters Committee
for Freedom of the Press
1125 15th Street, N.W.
Washington, D.C. 20005

E. Barrett Prettyman, Jr.
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Attorney for Amici Curiae

[List of attorneys continued on inside cover]

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

Of Counsel:

Erwin G. Krasnow
1771 N Street, N.W.
Washington, D.C.
The National Association
of Broadcasters

Arthur B. Sackler
Suite 400
1627 K Street, N.W.
Washington, D.C. 20006
The National Newspaper
Association

J. Laurent Scharff
Pierson, Ball & Dowd
1200 18th Street, N.W.
Washington, D.C. 20036
The Radio-Television News
Directors Association
1735 DeSales Street, N.W.
Washington, D.C. 20036

Leon Ely
Suite 118
Wards Building
Richmond, Virginia 23227
The Virginia Press
Association

Other Interested Parties:

The Associated Press
Managing Editors
50 Rockefeller Plaza
New York, New York 10020

The National Press Club
National Press Building
Washington, D.C. 20045

The Society of Professional
Journalists, Sigma Delta Chi
35 E. Wacker Drive
Chicago, Illinois 60601

INDEX

	Page
INTRODUCTION	1
JURISDICTIONAL STATEMENT	3
STATEMENT OF INTEREST	3
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	6
SUMMARY OF THE ARGUMENT	8
ARGUMENT	10
I The *Gannett* Ruling Has Been Widely Misunderstood and Must be Reexamined by the Court in the Face of a Rising Tide of Closed Criminal Proceedings	10
II The Court Should Make Clear That Even If the Decision in *Gannett* Stands, It Applies Only to Pretrial Hearings	16
III The Court Should Use This Opportunity To Reexamine Its Reasoning in *Gannett*, Even as to Pretrial Hearings, Particularly in the Light of Factors Not Considered in that Case	18
A. Exclusion from Public Forums Is A Prior Restraint	21
B. The Court May Have Eliminated an Effective Appeal of Closure Orders in Most Cases	28

Page

IV The Court Has Relied Upon a Probability of Danger at Trial That it has Specifically Discounted in Another Case 30

CONCLUSION 32

Table of Citations

Carroll v. President and Commissioners of Princess Anne, 292 U.S. 175 (1968) 23, 24, 25, 26

Craig v. Harney, 331 U.S. 367 (1947) 17

Gannett Co., Inc. v. DePasquale, 99 S.Ct. 2898 (1979) . . . . . *passim*

Near v. Minnesota, 283 U.S. 697 (1931) 9, 26, 27

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 27, 30, 31, 32

New York Times Co. v. United States, 403 U.S. 713 (1971) 9, 26, 27

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 23, 26

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 25, 26

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1974) 21, 22, 24, 25, 26

Virginia v. Stevenson, 218 Va. 462, 237 S.E. 2d 779 (1977), No. 68-A-77 (Va. Cir. Ct. May 30, 1978) 6

Page

CONSTITUTIONAL PROVISIONS:

FIRST AMENDMENT . . . . . *passim*

SIXTH AMENDMENT . . . . . *passim*

FOURTEENTH AMENDMENT 2, 5, 7

MISCELLANEOUS:

American Bar Association Standards Relating to the Administration of Criminal Justice, "Fair Trial and Free Press" (1978) 28

"Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press," American Bar Association Legal Advisory Committee on Fair Trial and Free Press, (1976) 29

Court Watch Study . . . . . *passim*, Appendix to Brief

Va. Code Sec. 19.2-266 8

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INTRODUCTION

This case is of the greatest interest and importance to the public and the press because it poses the issue of whether this Court – having sanctioned a secret court system for many pretrial hearings – is now prepared to extend this censorship principle by authorizing secret trial proceedings.

It is the position of these Amici that there is virtually no instance – and certainly not in this case – where the public and the press may be excluded from a criminal trial except upon a showing that such exclusion is essential in

order to avoid a direct, immediate and irreparable injury to the administration of justice.

Furthermore, this case presents the Court with an opportunity it should seize upon to reverse – or substantially modify – its ruling in *Gannett Co., Inc. v. DePasquale*, 99 S.Ct. 2898 (1979).

The *Gannett* decision has, within six weeks, produced flagrant misuse and misinterpretation of the type which this Court could never have envisioned. The instant case is an example of that abuse, because the Virginia Supreme Court cited the *Gannett* decision to justify a complete closing of a criminal trial.

The frequent use of *Gannett* and the scope to which it is being extended are not limited to pretrial confession hearings, but extend over the entire spectrum of the criminal justice process. Efforts have been made, some of them successfully, to close pre-indictment, trial, conviction and post-conviction proceedings.

The immediate impact of *Gannett* is quite clear. It is already encouraging widespread secrecy in the courts and undermining popular confidence in the integrity of our criminal justice system.

We respectfully submit that this Court should note probable jurisdiction in this case and halt the trend toward censorship before any further irreparable damage is done to the First, Sixth and Fourteenth Amendment rights of the press and the public to know how our courts are operating.

JURISDICTIONAL STATEMENT

This Brief Amici Curiae in support of Appellants is filed with the consent of Appellants and Appellees.

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment and freedom of information interests of the press. As this Court knows, this Amicus has appeared in virtually every recent case before the Court involving restrictions on the ability of the press to report judicial proceedings.

The Associated Press Managing Editors is an organization of 600 editors of newspapers affiliated with the Associated Press, which is the largest news-gathering organization in the world and is cooperatively owned by its member newspapers. It is extremely interested in First Amendment problems and has been active in many ways to further the news-gathering interest of the press.

The National Association of Broadcasters (NAB) is a non-profit incorporated association of radio and television broadcast stations and networks. As of September 1, 1979, NAB's membership included 2587 AM radio stations, 2030 FM radio stations, 583 television stations, and all nationwide commercial broadcast networks. The object of NAB, according to its Bylaws:

> [S]hall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and

> unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

Among NAB's primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The National Newspaper Association is a national organization of 5,500 newspapers with members in all 50 states. Its purpose is to preserve the constitutional guarantee of freedom of the press.

The National Press Club, the largest press club in the United States, is a broadly based journalistic organization. More than 1,200 active journalists, in all regions of the country, are members of the National Press Club.

The Radio-Television News Directors Association (RTNDA) is a non-profit professional organization of journalists. It includes approximately 1,500 members who are active in the supervision, gathering, reporting and editing of news and other information of public affairs broadcast by the national networks and by local radio and television stations throughout the nation.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization, of nearly 35,000 members representing every branch of print and broadcast journalism. It includes all ranks from student and beginning reporter to editor, publisher and broadcast executive. The Society works to preserve the public's right to know, to require that the public's business be conducted in public and to keep governmental records open to public inspection.

The Virginia Press Association is a non-profit corporation registered in the Commonwealth of Virginia representing a majority of the daily and weekly newspapers published in Virginia. The purpose of the Association is to expedite programs and activities furthering the editorial excellence of these newspapers and their service to the citizens of Virginia.

QUESTIONS PRESENTED

1. Should this Court reverse – or at least substantially modify – its decision in *Gannett v. DePasquale* on the grounds that it was wrongfully decided or that it is being so frequently abused that it must be significantly limited or qualified?

2. Do the First, Sixth and Fourteenth Amendments presumptively establish criminal trials as public forums open to members of the public and the press, or is the right to a public trial an exclusively personal right of the defendant?

3. If a criminal trial is a presumptively "public forum," can a prior restraint be imposed on the carrying out of that trial except upon a showing:

> (A) that there will be a direct and immediate injury to the fair administration of justice;
>
> (B) that the injury is irreparable because no trial or appellate court can repair the damage by any means, including but not limited to a directed verdict, dismissal, mistrial, or reversal of conviction; and,
>
> (C) there are no other reasonable alternatives to prevent this injury.

STATEMENT OF THE CASE

The Amici adopt the statement of facts as set forth by Appellants and summarize these facts as follows:

John Paul Stevenson, a Baltimore resident, was indicted for murder in March 1976 by a Grand Jury in Hanover County, Virginia, on charges of fatally stabbing the manager of the Holly Court Motel. The defendant was convicted in July 1976. That conviction was reversed in October 1977 by the Virginia Supreme Court because of the improper admission of evidence. 218 Va. 462, 237 S.E.2d 779 (1977).

Stevenson went to trial again in May 1978. On May 30 the Hanover County Circuit Court declared a mistrial because insufficient jurors were available. *Virginia v. Stevenson*, No. 68-A-77, issued May 30, 1978; see *Richmond News Leader*, May 31, 1978, p. 59, col. 1.

In June 1978, Stevenson's third trial began. On June 6 a mistrial was again declared. While no reason was publicly given, the *Richmond News Leader* quoted one source as saying, "***the mistrial declaration involved a prospective juror who had read about Stevenson's trial in a newspaper and had proceeded to tell other prospective jurors about the case before the trial began yesterday." *Richmond News Leader*, June 7, 1978, p. B-6, col. 1.

The fourth trial began in September 1978, and on September 11, the defense attorney moved to exclude the public and the press from the courtroom because, as the attorney explained, "* * * I don't want any information being shuffled back and forth when we have a recess as to what – who testified to what." The judge granted the motion. Appellants' Appendix D at 7a.

Later that day, Appellant Richmond Newspapers, Inc., publisher of *The Richmond News Leader* and *The Richmond Times-Dispatch*, and two of its reporters, Appellants Timothy B. Wheeler and Kevin McCarthy, made an appearance by counsel before the Hanover Circuit Court and objected to the closure order.

The Richmond Newspapers' counsel pressed the right of the public and press under the First and Sixth Amendments (as incorporated in the Fourteenth Amendment) to attend criminal trials, noting, "* * * where an exclusionary order is entered merely as a substitute for a gag order, which would otherwise place a direct restraint on what the press can publish, such exclusionary order * * * is merely a substitute for a direct prior restraint * * *." Appellants' Appendix E at 11a.

The defense attorney made abundantly clear that the sole reason for his motion was a fear of press reports. He said: "I didn't want * * * information to * * * leak out and if the press writes something, you know that they don't always quote exactly verbatim * * * and * * * one of the reporters said well, can't you order the * * * jurors not to read the paper or not to look at television. Well, that's – you know, that's just like telling the jury to disregard that statement. There's no way that you can do it * * *." *Id.* at 15a.

The hearing ended when the court said, "* * * we'll start again tomorrow morning at ten o'clock with the press and public excluded." *Id.* at 19a.

The judge specifically cited his power to close a trial under a state statute which provides in part that "In the trial of all criminal cases, * * * the court may, in its discretion, exclude from the trial any persons whose presence

would impair the conduct of a fair trail, provided that the right of the accused to a public trial shall not be violated." Va. Code Sec. 19.2-266; Appellants' Jurisdictional Statement at 6.

While it is not clear from the record precisely what the judge's reasoning was, he did appear to be sympathetic to the defense's argument that press stories could prejudice the jury. But he also noted that one of the factors was that "* * * having people in the Courtroom is distracting to the jury. * * * [W]hen we get into our new Court Building, * * * people can sit in the audience so the jury can't see them. * * *" Appellants' Appendix E at 16a.

On November 8, 1978, Richmond Newspapers and its reporters filed for a Writ of Mandamus in the Virginia Supreme Court. Appellants' Appendix K at 25a.

On July 9, 1979, the Virginia Supreme Court dismissed the petition, citing as support for its conclusion this Court's decision in *Gannett*. Appellants' Appendix A at 1a.

SUMMARY OF THE ARGUMENT

This Court's ruling in *Gannett* has been widely misunderstood, has created great confusion in the legal community, and needs to be reexamined. Moreover, it was based upon a series of factual assumptions which, in six short weeks, have proven to be inaccurate. See *Court Watch Study*, Appendix hereto. The already demonstrated misuse and abuse of *Gannett* should lead this Court to reverse that decision or at a minimum to modify it with specificity and particularity.

In such reexamination, the Court should consider that the right of the public and the press to attend, observe and comment upon the public carrying out of criminal justice is one of the most ancient and strongly vested rights granted under the Constitution of the United States.

Under a number of this Court's prior cases, the exclusion of the people and their surrogates, the media, from public forums, political events and performances, which they have a vested constitutional right to attend, constitutes a "prior restraint," and this right is separate and apart from the right of the criminal defendant to demand a public forum for his trial.

Therefore, any prior restraint on the public "performance" of a criminal trial can only be accomplished under the classic test enunciated in *Near v. Minnesota*, 283 U.S. 697 (1931), or more recently by three Justices of this Court in *New York Times Co. v. United States*, 403 U.S. 713, 723, 726, 730 (1971) (Douglas, Brennan & Stewart, JJ., concurring). This test requires a direct, immediate and irreparable injury without any reasonable alternative solution, and further that any effort to impose a prior restraint must be accompanied by notice and an opportunity to be heard.

ARGUMENT

I

THE *GANNETT* RULING HAS BEEN WIDELY MISUNDERSTOOD AND MUST BE REEXAMINED BY THE COURT IN THE FACE OF A RISING TIDE OF CLOSED CRIMINAL PROCEEDINGS.

This Court's ruling in *Gannett* has caused such widespread confusion in the legal community that it must be rectified before our traditional system of open criminal proceedings is entirely transformed into a chain of secret hearings, cut off from the very public that should act as its overseer.

We respectfully submit that this confusion cannot entirely be attributed either to a too facile reading of the various opinions or to inaccurate media reporting of what the Court held. Unfortunately, the *Gannett* opinions, read together, are legitimately subject to several interpretations.

One view is that because of the detailed discussion of trials in Parts IV and V(A) of Mr. Justice Stewart's opinion, the Court intended to cover in its conclusions the entire judicial process, even though a pretrial hearing was the precise factual context before the Court. However, such a reading would produce a result which would appear to have garnered the votes of only Justices Stewart, Powell, Rehnquist and Stevens, because the Chief Justice explicitly limited his conclusions to pretrial hearings.

A second view is that the discussion of trials was *dicta*, and that the Court intended its conclusions allowing closures to apply only to pretrial hearings. However, only the Chief Justice and Justices Stewart, Powell and Stevens appear to have subscribed to this view, because Mr. Justice Rehnquist spelled out his own conclusion that trials are covered as well.

Regardless of what type of proceeding was addressed, the question of whether under the Sixth Amendment the public has any right at all in the premises would appear to have been answered negatively by a majority of the Court, consisting of the Chief Justice and Justices Stewart, Powell, Rehnquist and Stevens. The public's First Amendment rights were not specifically decided by these same five Justices but were deemed satisfied in this case, if those rights exist at all, by virtue of the fact that no member of the public objected to the closure.[1]

As to the media, four members of the Court declined to reach the question of whether the press has a separate First Amendment right of attendance but nevertheless concluded that even if it did, its rights were satisfied by the "balancing" and "weighing" of relative values performed by the trial judge. Mr. Justice Powell decided that there is a separate First Amendment right in the press but agreed that it had been satisfied in this case, while Justices Brennan, White, Marshall and Blackmun concluded that if the press had a constitutional right – though no broader than the public's – it would require a showing of a number of "substantial probabilities" to overcome a "strict and inescapable necessity" before a criminal proceeding could be closed. 99 S.Ct. at 2938.

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[1]With great respect, we would point out that the chance of a lay member of the public rising up and protesting a judge's order that he remove himself from a courtroom is so remote as not to warrant serious consideration. Even an informed member of the public might well feel that he would risk a contempt order by such apparently blatant conduct. Moreover, under the guidelines laid down by this Court, it would be virtually impossible for a layman to articulate any legal grounds for his remaining in the courtroom.

On the issue of whether – once the defendant and prosecutor have come to agreement – there need be any showing of any kind before a closure is proper, one can only say that the parts of Mr. Justice Stewart's opinion dealing with the rights of the public under the Sixth Amendment would appear to indicate that no such showing is necessary. The parts of his opinion treating the rights of the public and the press under the First Amendment are equivocal on this subject, because the public and the press may or may not have any First Amendment rights at all. The fifth vote necessary to constitute a majority – that of Mr. Justice Rehnquist – is unequivocally opposed to the necessity of any showing whatever, regardless of which Amendment or which party is involved.

Given the recitation above, it is hardly surprising that lower court judges have exhibited no small measure of confusion as to what they are supposed to do when faced with a motion to close all or any part of a criminal proceeding.

But one thing is certain: proceedings are being closed. Closure motions are being made, in fact, at a rate of better than one a day, and more than 50 percent of them are being granted. In view of the fact that *Gannett* was decided at the beginning of the summer, when many courtrooms are not in operation, when media reporting of the decision is seen by a relatively small audience, and when legal periodicals have not yet had an opportunity to comment upon the decision, it is clear that these initial closures are merely the hesitant beginning of an ever-increasing trend.

Moreover, *Gannett* is being read to sanction the closure of trials as well as pretrial hearings, with or without the consent of the prosecutor, and with or without any kind

of showing that a closure is required for any legitimate reason. These cases are detailed in the *Court Watch Study* submitted as the Appendix hereto.

This Study is important for still another reason. It demonstrates that a number of factual assumptions underlying Mr. Justice Stewart's opinion are simply not accurate when measured by what is actually taking place. For example:

(a) Mr. Justice Stewart and those joining his opinion felt that the "Sixth Amendment permits and even presumes open trials as a norm." 99 S.Ct. at 2908. This statement would appear to suggest that motions to seal criminal justice proceedings will, under this decision, be made infrequently and will be granted rarely and only in unusual cases with a substantial danger of prejudicial publicity.

As noted above, the *Court Watch Study* submitted as the Appendix clearly shows that closure motions are being made frequently and – given the advocate interest of the defense bar – will probably become a routine tool in criminal cases. The study shows 51 efforts to seal criminal proceedings made during the first seven, early-summer weeks following *Gannett*. The Study also shows that of these 51 efforts, 26 were successful, including a number of cases where publicity was minimal. In addition, several of these motions were granted for reasons having nothing to do with prejudicial publicity, such as embarrassment to a witness or embarrassment to a defendant. See, *e.g.*, Appendix, Nos. 10, 26, 30, 41, 46.

(b) This Court ruled that closure motions should only be granted in pretrial hearings involving confessions where there is a "reasonable probability" of prejudice to the defendant's right to obtain an impartial jury. 99 S.Ct. at 2912.

The *Court Watch Study* shows that closures have been granted in many other types of proceedings – including a probable cause hearing on an arrest warrant (Appendix, No. 10), three trials (Appendix, Nos. 3, 26, 41), a sentencing (Appendix, No. 9), and a guilty plea conviction (Appendix, No. 4), in addition to 21 pretrial proceedings and one prior restraint order forbidding publication. Appendix, including No. 27.

(c) This Court thought that the prosecutor would represent the "societal interest in an open trial." 99 S.Ct. at 2908 n.12. The *Court Watch Study* shows that in a substantial number of cases, prosecutors have supported closure motions (Appendix, Nos. 2, 4, 18, 20, 31, 40), in a few cases the prosecutors have opposed such motions, but in most cases the prosecutor has taken no position at all.

(d) This Court's opinion is being interpreted as giving *less* – rather than the same – rights to the press than to the public to attend and comment upon criminal justice proceedings.

The *Court Watch Study* shows that at least five courts have held proceedings where less rights were accorded the press than the public to attend and comment. These included four cases open to the public and closed to the press. Appendix, Nos. 12, 22, 24 and 48. One judge admitted the public and the press but imposed an order prohibiting the press from publishing what had occurred. Appendix, No. 27.

(e) This Court apparently assumed, without specifically deciding, that a member of the press or the public would generally be able to make a contemporaneous objection to a pretrial closure motion. For example, Mr. Justice Stewart noted that "none of the spectators present in the

courtroom, including the reporter * * *, objected when the defendants made the closure motion." 99 S.Ct. at 2912. And Mr. Justice Powell, while suggesting in his concurrence that members of the public or the press "must be given an opportunity to be heard," then added: "But this opportunity extends no farther than the persons actually present at the time the motion for closure is made * * *." *Id.* at 2916.

While the issue is not directly covered in the *Court Watch Study*, Amici can represent to this Court that in many instances the news reporter or member of the public appears at the courthouse only to find the doors locked and the court in session. Under these circumstances, it is virtually impossible, without notice of any kind, for the reporter, the public or their counsel to make any contemporaneous objection.

On at least one occasion in which a closure hearing was held, the question of closure was argued largely in secret without the participation of counsel for a newspaper objecting to closure. Furthermore, even though the judge later announced that he had decided against closing the preliminary hearing, he also disclosed that he had secretly heard and ruled upon evidentiary matters that would not be repeated in the open preliminary hearing that followed.

Thus, five Justices appear to have overlooked the frequent situation where even if there is some theoretical right to object, that right is meaningless because of the practicalities involved, including lack of notice and an inability to enter the courtroom.

In conclusion, the *Gannett* decision is being used and misused – substantively, procedurally and practically – to

censor criminal justice proceedings all across the nation, and this Court should either reverse that decision or clearly specify its narrow applicability in order to stop any further damage to the public's right to perceive how its courts are operating and what is actually transpiring in its courtrooms.

II

THE COURT SHOULD MAKE CLEAR THAT EVEN IF THE DECISION IN *GANNETT* STANDS, IT APPLIES ONLY TO PRETRIAL HEARINGS.

As noted above, the *Gannett* case dealt with a pretrial hearing, and the Court's specific holding was therefore presumably limited to that situation. Nevertheless, there were discussions by several Justices of constitutional rights in relation to closures at trial.

In brief, the four dissenting Justices would appear to adopt a "strict and inescapable necessity" test for the closing of trials as well as pretrial hearings, 99 S.Ct. at 2938; the Chief Justice has reserved all questions regarding trials; Mr. Justice Powell may believe there is some First Amendment interest to be protected, although the delineation of this protection insofar as the public is concerned is not clear; Justices Stewart and Stevens reserve the First Amendment question in the context of trials; and only Mr. Justice Rehnquist would hold flatly that there is no right in the public or the press to attend criminal trials.

Under these circumstances, we submit that the issue of closed trials should be a viable one, yet to be determined by a majority of the Court. We urge the Court to note probable jurisdiction in the instant case and to decide this issue favorably to Appellants.

On the question of whether the issue is a sufficiently important one, requiring immediate attention, we need only point to the fact, evidenced by the *Court Watch Study*, that trials are indeed being closed at an increasing rate, and *Gannett* is being relied upon as the legal basis for these closures.

The Virginia Supreme Court in this very case, based apparently on Mr. Justice Stewart's *dicta*, cited *Gannett* as its authority for upholding a trial court order entirely excluding the public and the press from a trial on the grounds that prejudicial press reports might be read by jurors and/or that people in the courtroom would distract the jury.

In urging this Court to rule in favor of Appellants, we need not repeat or even synthesize the eloquent dissent of Mr. Justice Blackmun. We would only emphasize his conclusion that the Sixth Amendment right to a public trial "reflects the tradition of our system of criminal justice that a trial is a 'public event' and that '[w]hat transpires in the court room is public property.' *Craig v. Harney*, 331 U.S. 367, 374 (1947)." 99 S.Ct. at 2922. The Sixth Amendment guarantee of a public trial is inextricably woven into the First Amendment guarantee of freedom of speech and press, because the administration of justice is one of the most important of governmental functions. For that reason, the local courthouse – especially during criminal trials – historically has been considered *the single most important public forum* we have.

Amici thus urge the Court to recognize the intended interface between the Sixth Amendment obligation to conduct trials in public and the First Amendment right of citizens to attend these trials and to use the information they obtain in the exercise of their political franchise. The

prohibition against public attendance at a criminal trial has the direct effect of suppressing information and comment protected by the First Amendment. This is not, therefore, a question of discretionary access as described in Mr. Justice Stewart's analysis,[2] but rather a matter of a public forum right which has been firmly vested for centuries in the public and the press. It is a right, therefore, that can only be extinguished, as explained more fully below, under the strictest constitutional test applicable to prior restraints.

We respectfully urge this Court to make these points explicitly clear to a legal profession – bench and bar – that is now confused and, worse, embarked on a course that can only convert one of our most cherished institutions into a star chamber-type process that is closed from public view.

III

THE COURT SHOULD USE THIS OPPORTUNITY TO REEXAMINE ITS REASONING IN *GANNETT*, EVEN AS TO PRETRIAL HEARINGS, PARTICULARLY IN THE LIGHT OF FACTORS NOT CONSIDERED IN THAT CASE.

Amici fully appreciate that it is most unusual for the Court to be asked, through the vehicle of another case, to reexamine one of its decisions within a matter of months after that decision has been rendered. We submit, however, that these are unusual circumstances. Seldom are the practical effects of a decision so immediately ap-

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[2] With great deference, however, we do believe, and would argue if given the opportunity, that there is a First Amendment right of access on behalf of both the public and the press.

parent. Seldom is it so clear so quickly that the effect of what the Court has done is to undermine the ordered application of justice and to prevent the public from viewing what is rightfully theirs.

The fact is that 89 percent of all indictments are disposed of during pretrial proceedings, so that any attempted distinction between a pretrial hearing and a trial on the basis of *importance* is an artificial one. An example recently occurred in Albany, New York, where a sealed pretrial hearing led to a secret guilty plea and conviction. See Appendix, No. 4. *Gannett* has had such a pernicious effect, in fact, that in another recent case there was a closed, secret conference to determine *whether* the pretrial hearing itself should be closed, despite the fact that the closure motion was totally unsupported by any proffered evidence. Appendix, No. 36.

This Court simply could not have perceived in *Gannett* that what is happening would in fact occur. As noted above, the factual assumptions upon which its decision was based have not proven out in a number of important ways. Yet the worst is yet to come. As the fall approaches, courts reopen, and word of the case more fully spreads throughout the profession – particularly to the criminal defense bar – the results will be even more startling.

Criminal defense attorneys will perceive that whether their clients are ultimately found innocent or guilty, they are better served by not having the prosecution's adverse evidence detailed in public and given publicity. Moreover, attorneys appointed to defend indigents may well feel called upon to file closure motions as a matter of course, for fear of being charged with ineffective assistance of counsel should they fail to do so.

Idealistically, prosecutors will fit the mold portrayed by Mr. Justice Stewart and will protect the public interest. Unfortunately, many will perceive their role as a more limited one. Their chances of having a conviction reversed will seem to them less likely if they agree to a closure motion than if they oppose it. Further, they may feel that their own witnesses will testify more freely – though not necessarily more accurately – in secret than they would under the scrutiny of the press and the public.

And what is a trial judge to do with a closure motion put forth by the defense and unopposed by the prosecution? Since this Court has spelled out no specific *standards* under its "reasonable probability of prejudice" test, 99 S.Ct. at 2912, that must be met by the proponent of closure, it would appear that the trial judge would have no legal grounds under *Gannett* for denying the motion.[3]

We are thus seeing only the beginning, not the apex, of the closure process.

But there are additional reasons why *Gannett* should be reexamined at this time. At least two facets of the overall problem were not presented to or dealt with by the Court in *Gannett*, and they deserve the Court's serious consideration.

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[3] The situation described above assumes that all parties and the court are acting essentially in good faith. One cannot be blind, however, to those occasions when police, prosecutors or even the courts are engaged in covering up mismanagement or corruption. A closed pretrial hearing, for example, is the perfect opportunity for pay-offs or improper bargains that bring prosecutions to a quick end.

A. Exclusion from Public Forums Is a Prior Restraint

The carrying out of criminal justice is inextricably intertwined with the most precious of First Amendment rights of expression because the operation of the courts – in their handling of criminal cases – so frequently raises questions of significant political importance in regard to the behavior of law enforcement officials, prosecutors, defense counsel, jurors and the general administration of justice.

This Court has long held that the exclusion of the public from a public forum which the public has a vested right to attend is a prior restraint under the First Amendment because it prohibits the speaker from speaking and the citizen from both listening and using the information for his or her own political or social purposes.

This Court's most recent enunciation of this prior restraint doctrine – as it applies to public forums – came in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1974).

In that case, this Court, through Mr. Justice Blackmun, addressed the issue of whether a municipally-owned auditorium could prohibit the public performance of a theatrical event in which there was nudity and obscenity without any finding that the performance was pornographic and therefore outside the protection of the First Amendment.

In ruling that government officials could not suppress the performance, the Court said:

> Respondents' action here is indistinguishable in its censoring effect from the official actions *consistently identified as prior restraints* in a long line of this Court's decisions. * * * The restraints took a variety of forms, with officials exercising

> control over different kinds of public places under the authority of particular statutes. All, however, had this in common: they gave public officials the power to deny use of a forum in advance of actual expression. [*Id.* at 552, 553; emphasis supplied; citation omitted.]

The Court continued: "Only if we were to conclude that live drama is unprotected by the First Amendment – or subject to a totally different standard from that applied to other forms of expression – could we possibly find no prior restraint here." *Id.* at 557.

The Court then went on again to state that exclusion of the public – or, in the alternative, suppression of the performance – was a prior restraint. And with regard to public forums, "[t]he settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Id.* at 559.

Following this Court's reasoning in *Southeastern Promotions*, Amici could contend that a criminal trial – the state's effort to take away a person's liberty – has as great or greater status as a public forum than does a "live drama" within any meaning of the term. It is, if anything, one of more significance, with more public impact, than a play in which no one's life or liberty is at stake, and our judicial system is not under scrutiny. By giving a judge the power to decide whether or not citizens will witness this drama, we are empowering public officials to deny use of a forum in advance of "actual expression" – the precise definition of censorship in *Southeastern Promotions*. *Id.* at 553.

A second case in which this Court found exclusion of the public from a public forum to be a prior restraint was

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). In that case, a real estate agent accused of blockbusting obtained an injunction against a neighborhood organization, forbidding the organization from using public streets to picket the agent. This Court found that the injunction against the use of public facilities for picketing was a "prior restraint" with a "heavy presumption" against its constitutional validity.

It is true, of course, that part of this Court's reasoning was based upon its concern for the suppression of pamphlets as well as the injunction prohibiting picketing. But the conduct of a criminal trial also results in the circulation of important information – in this instance, information about our court system – to the local community.

In *Organization for a Better Austin*, the real estate agent argued that he had a right to "privacy," a right not to be subjected to public criticism for his actions. But this Court replied that privacy is not a sufficient justification under the First Amendment "to stop the flow of information * * * to the public." *Id.* at 420.

In the case at bar, the judge, the prosecutor, and defense counsel are making the same privacy argument – that a defendant has a right to protect his privacy from public view by waiving his right to a public forum. But the public performance of justice is even less of a private affair than the behavior of a real estate broker, and the same prior restraint consideration which caused this Court to protect the giving and receipt of neighborhood views should be employed to protect the receipt of information about criminal trials.

The third case in which this Court has protected public forums against prior restraints is *Carroll v. President and Commissioners of Princess Anne*, 292 U.S. 175 (1968). This

case involved an injunction, obtained *ex parte*, by town officials against a white supremacy organization, prohibiting it from conducting anti-black and anti-semitic demonstrations on the court house steps in a racially tense town.

Alleging that the racist demonstration would "endanger the citizens of the County," the local court issued the injunction. Once again, this Court said that prohibiting attendance at a public forum constituted a prior restraint. The Court insisted upon "careful procedural provisions, designed to assure the fullest presentation and consideration of the matter * * *." *Id.* at 181.

While it is true that in the instant case a hearing of sorts was held, there are not specific findings of fact to justify any direct, immediate and irreparable injury to the administration of justice. It is difficult to define the precise reasons for the trial court's imposition of a prior restraint, other than a vague aversion to publicity and a protective attitude toward the sensibilities of jurors under scrutiny. Indeed, the results of a prior restraint here are all the more egregious because any possibly damaging publicity almost certainly has already become part of the public domain by virtue of having been revealed at the first of the defendant's prior trials.

The majority in *Gannett* stressed that any injury from exclusion is only temporary "once the damage of prejudice has dissipated" because a transcript of the suppression hearing is then made available. This justification seems entirely inconsistent with *Southeastern Promotions* and *Carroll*. Addressing the question of whether the prior restraint could be justified because there were alternative ways the public might be able to see the performance at a private, non-governmentally owned theater, this Court said in *Southeastern Promotions*:

> [I]t does not matter for purposes of this case that the board's decision [suppressing the performance] might not have had the effect of total suppression of the musical in the community. Denying use of the municipal facility under the circumstances present here constituted prior restraint.
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> * * *
>
> Only if we were to conclude that live drama is unprotected by the First Amendment – or subject to a totally different standard from that applied to other forms of expression – could we possibly find no prior restraint here. [420 U.S. at 556, 557.]

And the Court in *Carroll* pointed out that since it is vital to the operation of democratic government that citizens have facts and ideas on important issues before them, a delay of even a day or two may in some instances be of crucial importance. 393 U.S. at 182. Certainly information about the criminal justice process – of the actions of police, prosecutors, defense counsel, jurors and judges – is even more fungible than the ideas communicated by a musical comedy or even by a demonstration.

To force the press to wait weeks or months in order to report what occurs in the courtrooms of this nation is to impose stop-watch censorship on the First Amendment.

A fourth case in which this Court placed First Amendment prior restraint protections on public forums is *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), where this Court said: "* * * Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to

express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities * * *. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.* at 96.

Therefore, what goes on in a courtroom is a political expression on issues of the highest importance to the public, and Amici would urge that it is of equal or greater importance than the racial demonstrations in *Carroll,* the picketing in *Mosely* and *Organization for a Better Austin,* and the musical in *Southeastern Promotions.* It is, in fact, information as crucial as the pamphlet in *Near* or the study in *New York Times Co. v. United States* and must be accorded precisely the same protection against prior restraints.

We recognize, of course, that too hasty a reaction to the cases cited above might lead one to argue that they all relate to protests by those who seek to speak as opposed to those who seek to hear. But an analogy will demonstrate that concomitant rights are at work. Someone granted the right to make his speech in an empty field, or in a locked and empty room, is as effective a denial of his First Amendment rights as if he were precluded from speaking at all. Communication is a two-way process: speaking (by way of voice, pamphlet, parading, or whatever) and receiving the information imparted. *Cf. Virginia Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. 748 (1976). Can anyone doubt that if an audience were ordered to plug its ears, this would be a dual constitutional violation – a violation of the rights of the speaker who was never heard, and a violation of the rights of the audience that was never allowed to hear?

And so, properly construed, the public forum cases cited above lead inexorably to the conclusion that the danger of a prior restraint relates as much to the inability of the community to be informed as it does to the speaker's inability to impart information. Precisely the same process is at play in the courtroom. The defendant has a right to be heard, but the members of the public and the press have a separate right of their own to receive information, not just because the defendant may want them to receive it, but because the information, ranging across the entire spectrum of courtroom activities, is of crucial importance for the public to have. The public's right is not just the right to hear the defendant. It is broader: the right to absorb the entire criminal adjudication process. Just as one speaker on a panel could not waive the right of the entire panel to be heard and thereby preclude the audience from listening to the other speakers, so here a defendant cannot, by the device of waiving his own Sixth Amendment rights, prevent the public from viewing, hearing and using all events occurring at a criminal trial.

Because the cases above cover the sitaution here, the standard to be applied is one of "direct and immediate injury to the fair administration of justice," provable by a clear preponderance of specific evidence in order to overcome the "heavy burden" which this Court has established for prior restraints. *Near v. Minnesota, supra; New York Times Co. v. United States, supra,* 403 U.S. at 727.

Included in this standard must be a finding that the injury is "irreparable" – that there is no remedy in law for the damage to the administration of justice by concurrent or subsequent actions of any trial or appellate court able to repair the injury by all of the means suggested by *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 563 (1976), as well

as by Mr. Justice Blackmun in his dissent in *Gannett*, but also including a directed verdict, dismissal, mistrial or conviction reversal.[4]

If a criminal trial is a presumptively "public forum," as we contend, a prior restraint cannot be imposed on the public carrying out of that trial except upon a showing:

(a) that there will be a direct and immediate injury to the fair administration of justice;

(b) that the injury is irreparable because no trial or appellate court can repair the damage by any means, including a directed verdict, dismissal, mistrial, or a reversal of conviction; and,

(c) that there are no other reasonable alternatives to prevent this injury.

B. The Court May Have Eliminated an Effective Appeal of Closure Orders in Most Cases.

The Court is fortunate in having before it a case in which Appellants were at least deemed by the Virginia courts to have sufficient standing to appeal, even though their appeal was subsequently dismissed on the merits. In many cases, however, neither the public nor the press is being allowed to appeal closure orders, and this unhappy result is a direct consequence of the lower courts' reading of *Gannett*.

In *Gannett*, five Justices apparently held that the public and the press have no Sixth Amendment rights whatever that would entitle them to attend a criminal pretrial hear-

[4] An alternative, though less desirable, substantive standard would be that adopted by the American Bar Association Committee. *See:* American Bar Association Standards Relating to the Administration of Criminal Justice, "Fair Trial and Free Press" (1978), adopting the "clear and present danger" test.

ing – and perhaps a criminal trial itself. If that same ruling is applied to the public and the press in regard to their First Amendment rights, the logical result is that no one other than the prosecutor has standing to challenge on appeal a closure order, including one entered for the specific purpose of furthering corruption or other illegal conduct.

Moreover, even under the view of Mr. Justice Powell, who found a First Amendment right and thus a right to be heard, "* * * it would be entirely impractical to require criminal proceedings to cease while appellate courts were afforded an opportunity to review a trial court's decision to close proceedings." 99 S.Ct. at 2915.

Thus, no combination of Justices would appear at this time to grant either the public or the press a sufficient interest in closure proceedings so that they could appeal in time to keep the courtrooms open. If the proceedings do not "cease," using Mr. Justice Powell's term, so that a closure can immediately be tested on appeal, it is obvious that even where parties are accorded standing to appeal, the issue of closure will be mooted by the time an appellate ruling is forthcoming. Even more ominously, if a majority of the Court does not find a First or Sixth Amendment right in either the public or the press, there will be no one with standing to appeal at all, once a prosecutor has decided not to oppose the closure motion. Surely the Court could not have intended any such result, particularly when the legality or propriety of the prosecutorial function itself may be what Appellants are attempting to challenge on appeal.[5]

[5] *See:* Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press," American Bar Association Legal Advisory Committee on Fair Trial and Free Press, (1976), adopting notice and other procedural standards for closure. The draft was prepared in 1975 and approved by the ABA House of Delegates in 1976.

IV

THE COURT HAS RELIED UPON A PROBABILITY OF DANGER AT TRIAL THAT IT HAS SPECIFICALLY DISCOUNTED IN ANOTHER CASE.

We would finally point out that part of the underpinning of the Court's *Gannett* decision is the danger of publicity arising out of a pretrial hearing that will adversely affect the defendant at trial. Mr. Justice Stewart's opinion states that "The danger of publicity concerning pretrial suppression hearings is particularly acute, because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of the trial." 99 S.Ct. at 2905.

Yet when this Court was faced with precisely the same type of argument in *Nebraska Press Ass'n v. Stuart, supra,* its answer was that a prior restraint was not sustainable in part precisely *because* of the speculative nature of trying to gauge the impact of adverse publicity on a subsequent trial. The Court said:

> Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pretrial publicity *could* impinge upon the defendant's right to a fair trial." (Emphasis added.) *His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.*
>
> * * *

> We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy v. Florida,* 421 U.S. 794 799 (1975). Appellate evaluations as to the impact of publicity take into account what other measures were used to mitigate the adverse effects of publicity. The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice. [427 U.S. at 562, 563, 565; emphasis added.]

In *Nebraska Press Ass'n,* the adverse publicity related to six murders and necrophilia. If there was ever a case where the trial court could assume that publicity would harm the defendant, it was in that case. Yet the danger was deemed insufficient to allow the issuance of a prior restraint because there were alternative methods of dissipating any possible adverse impact on the defendant.

In *Gannett,* the publicity was of a far less harmful nature, and in the instant case, there is no record of actual or potential adverse publicity at all. Moreover, we are here dealing with a trial itself, rather than a pretrial hearing that could affect the trial, and there are obvious ways of protecting jurors once they are selected. Whether in a pretrial or trial setting, however, the impact of adverse publicity on jurors is, as pointed out in *Nebraska Press Ass'n,* "of necessity speculative, dealing * * * with factors unknown and

unknowable." 427 U.S. at 563.[6] And the same alternative methods of dissipating the possible adverse effects of publicity are present here.

CONCLUSION

For each of the reasons outlined above, as well as those set forth in the Jurisdictional Statement, we respectfully urge the Court to note probable jurisdiction, reverse the judgment below, and in the process reexamine its *Gannett* decision with a view toward granting the public and the press the right to require open courtrooms except under the most stringent and exceptional circumstances.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorney for Amici Curiae

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[6]It is also interesting that in *Nebraska Press Ass'n* this Court found wholly insufficient the furnishing of a transcript of the proceeding, 427 U.S. at 561, whereas in *Gannett* the transcript was treated as almost of equal importance as the open proceeding itself. 99 S.Ct. at 2912.

Of Counsel:

Jack C. Landau
Peter C. Lovenheim
The Reporters Committee
for Freedom of the Press
1125 15th Street, N.W.
Washington, D.C. 20005

Erwin G. Krasnow
1771 N Street, N.W.
Washington, D.C.
The National Association
of Broadcasters

Arthur B. Sackler
Suite 400
1627 K Street, N.W.
Washington, D.C. 20006
The National Newspaper
Association

J. Laurent Scharff
Pierson, Ball & Dowd
1200 18th Street, N.W.
Washington, D.C. 20036
The Radio-Television News
Directors Association
1735 DeSales Street, N.W.
Washington, D.C. 20036

Leon Ely
Suite 118
Wards Building
Richmond, Virginia 23227
The Virginia Press
Association

Other Interested Parties:

The Associated Press
Managing Editors
50 Rockefeller Plaza
New York, New York 10020

The National Press Club
National Press Building
Washington, D.C. 20045

The Society of Professional
Journalists, Sigma Delta Chi
35 E. Wacker Drive
Chicago, Illinois 60601